STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MT. DIABLO EDUCATION ASSOCIATION, CTA/NEA, Charging Party, and JOHN MILLS, PETER MOLINO, CAROL YOUNG, CATHERINE AVINGTON, LAURIE PETERSON AND LES GROOBIN, Intervenors, v. MT. DIABLO UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-452 Request for Reconsideration PERB Decision No. 373 PERB Decision No. 373b August 15, 1984
MT. DIABLO FEDERATION OF TEACHERS, LOCAL 1902, CFT/AFT, AFL-CIO, JOHN MILLS, PETER MOLINO, CAROL YOUNG, CATHERINE AVINGTON, LAURIE PETERSON AND LES GROOBIN, Charging Parties, v. MT. DIABLO UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-455

Appearances: Kirsten L. Zerger, Attorney for Mt. Diablo Education Association, CTA/NEA. Gregory J. Dannis, Attorney (Breon, Galgani, Godino and O'Donnell) for Mt. Diablo Unified School District; W. Daniel Boone, Attorney (Van Bourg, Allen, Weinberg & Roger) for the individual charging parties; Peter A. Janiak, Attorney, for the California School Employees Association, as Amicus Curiae; Glenn Rothner, Attorney (Reich, Adell & Crost) for the American Federation of State, County and Municipal Employees and the California Faculty Association, as Amicus Curiae; Bernard L. Allamano, Attorney for the California State Employees Association, as Amicus Curiae.

Before Hesse, Chairperson; Jaeger, Morgenstern, and Burt, Members.

DECISION

JAEGER, Member: The Public Employment Relations Board (PERB or Board) having duly considered the request for reconsideration[1] submitted by the Mt. Diablo Education Association, CTA/NEA (MDEA or Association) and the individually named Charging Parties, hereby grants that request, in part, consistent with the discussion below.[2]

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[1]PERB rules are codified at California Administrative Code, title 8, section 31001 et seq. PERB rule 32410(a), which governs reconsideration requests, provides:

> Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision . . . The grounds for requesting reconsideration are limited to claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

[2]In the underlying decision, the Board found that the District violated subsections 3543.5(a), (b), and (c) of the Educational Employment Relations Act (EERA or Act) by refusing to negotiate the impact of its decision to lay off certificated employees.

The EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise indicated.

Section 3543.5 provides, in relevant part:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise

DISCUSSION

1. Duty To Bargain Impact of Layoffs

The Association requests reconsideration of the Board's determination, at p. 26 of the underlying Decision, that "an employer's duty to provide notice and an opportunity to negotiate the effects of its decision to lay off arises when the employer reaches a firm decision to lay off."[3] (Emphasis added.)

The Association's argument is simply a restatement of its position before the Board, which was considered and rejected in the underlying Decision. In Rio Hondo Community College District (5/16/83) PERB Decision No. 279a, the Board indicated that a mere restatement of a legal argument that was considered and rejected by the Board is not an "extraordinary circumstance" which justifies granting reconsideration of a Board decision. We, therefore, deny the request for reconsideration of this portion of the underlying Decision.

> to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

[3]As the Board noted in the underlying Decision, the determination of when management has reached a "firm decision" to lay off is a question of fact. Based on the record in this case, the Board found that the Association failed to prove that the District reached a firm decision to lay off prior to the promulgation of the school board's implementing resolutions.

See also Anaheim City School District (5/14/84) PERB Decision No. 364a; Pittsburg Unified School District (4/2/84) PERB Decision No. 318a.

2. Same Date of Hire

The Association requests reconsideration of the Board's determination that Education Code section 449554 "creates an inflexible standard which supersedes the right of employees to negotiate the criteria for determining the order of layoff of employees with the same date of hire." (Decision, p. 44.)

Again, the Association's argument is a restatement of its previous position before the Board which was rejected by the Board majority. Accordingly, the Association's request for reconsideration of this issue is denied. Rio Hondo Community College District, supra; Anaheim City School District, supra; Pittsburg Unified School District, supra.

3. Sua Sponte Board Review

In his proposed decision, the hearing officer found that certain proposals submitted by the Association were within the scope of representation and that the District's refusal to

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[4]Education Code section 44955 provides in relevant part:

> As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of the needs of the district and the students thereof.

negotiate those proposals constituted a violation of its duty to negotiate in good faith. Other proposals he found to be outside the scope of representation and dismissed those portions of the charge accordingly. The parties did not file exceptions to a number of these determinations. Citing Fresno Unified School District (4/30/82) PERB Decision No. 208, the Board determined that, despite the fact that no exceptions were filed, it was necessary to review certain of the hearing officer's findings sua sponte in order to avoid a serious mistake of law. The Board found that it would be inappropriate to summarily affirm the hearing officer's determination that a proposal was negotiable—where the Board itself disagreed with the hearing officer's determination—since the Board might "find itself in the position of ordering an employer to negotiate over a subject of bargaining which it ha[d] no legal duty to negotiate." (Decision, p. 37, fn 20.) Thus, the Board undertook sua sponte review of those scope findings where the Board felt that the hearing officer had erred in his determination that a proposal was within the scope of representation. However, the Board summarily affirmed those of the hearing officer's scope determinations with which it agreed.

The Association requests reconsideration of the Board's determination that it was appropriate to analyze certain of the bargaining proposals sua sponte in order to determine whether they were within the scope of representation. The Association

raises a number of separate arguments in connection with this basic contention.

First, it restates its argument that it was "unfair" for the Board to consider the District's scope of representation defense, since that defense was first raised in the District's reply brief, to which the Association had no opportunity to respond.

In the underlying Decision, the Board rejected this argument, stating that the Association had the ultimate burden of proving (l) that the employer refused to negotiate in good faith, and (2) that that refusal concerned a matter within the scope of representation. (Decision at p. 37, fn 20.) Thus, the Board concluded that "it was not only proper for the hearing officer to consider this issue, but it was required as a matter of law." (Id.) In our view, the Board's determination was proper and, we therefore deny the Association's request for reconsideration of this issue.

Next, the Association argues that the Board should have required the District to seek clarification of ambiguous proposals as required in Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District (1/5/84) PERB Decision No. 375.5

[5]In Healdsburg, supra, at p. 9, the Board determined that:

> it is necessary to balance an employer's duty to negotiate in good faith and its

Since Healdsburg issued after the underlying Decision, we find it appropriate to grant reconsideration to apply the duty to clarify standard. However, we have reviewed the Association's bargaining proposals in the instant case, and do not find them ambiguous. Thus, we find the Board's determination in the underlying Decision, that certain of the Association's proposals were nonnegotiable, was based on clear language and thus there is no need to order the District to seek clarification of those proposals which we found nonnegotiable.

Finally, the Association argues that the right of PERB to review matters sua sponte "does not require review of matters where the record is incomplete and the parties have not had an opportunity to litigate the matter fully." In such circumstances, the Board is unwarranted in reviewing the record sua sponte. In the instant case, the Association asserts, a

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> right to be adequately informed of the exclusive representative's specific negotiating interests. The resolution we find to be both practical and consistent with the give-and-take of the bargaining process is to utilize that process itself to resolve the ambiguities present in bargaining proposals. This requires the objecting party to make a good faith effort to seek clarification of questionable proposals by voicing its specific reasons for believing that a proposal is outside the scope of representation and then entering into negotiations on those aspects of proposals which, following clarification by the other party, it finally views as negotiable.

complete record does not exist upon which PERB could base a sua sponte review. In particular, because of the District's "surprise" scope of representation defense, the Association was precluded from presenting evidence that reassignment of librarians was a foreseeable result of the decision to lay off or that the existing collective agreement did not cover the extra work performed by librarians as a result of the layoff. By not affording the Association the right to litigate this question fully, it asserts that it was effectively denied due process by the Board's determination.

For several reasons, we find it difficult to see how the Association was denied due process in this case. First, as noted above, the Association had the burden of proving that the District refused to negotiate about matters within the scope of representation. Second, it had the option of excepting to the hearing officer's treatment of scope issues. Rather than arguing that the proposals were negotiable, however, the Association excepted to the hearing officer's decision on the ground that he had no "authority" to consider the District's scope of representation defense. Unfortunately, the Association did not choose to brief the Board on any specific scope of representation issue. It was not precluded from raising these issues in its brief before the Board.

In sum, we find that the Board's handling of scope issues sua sponte was fair and reconsideration is unwarranted.

4. Uncharged Violations

In the underlying Decision, the Board found that in order to prove a violation of the duty to bargain the effects of a layoff decision, the Association need only show that, at the time the employer allegedly refused to negotiate concerning layoff effects, it was reasonably foreseeable that a layoff would impact the working conditions of employees. The Board also indicated that a discrete violation could be found where, irrespective of whether the exclusive representative sought to negotiate the impact of layoffs, the employer later unilaterally changed the working conditions of those employees who were not laid off.

However, the Board refused to find an independent violation based on unilateral changes in the working conditions of employees not subject to the layoff, reasoning as follows:

> Whether or not the hearing officer correctly found, as he apparently did, that, as a result of the District's decision to reduce certificated services, it unilaterally increased the workload of District counselors and librarians and altered the stipends of coaches during the ensuing school year, we cannot find an independent violation of the Act since the Association never filed an independent unfair practice charge. The Association's unfair practice charge in this case was filed on March 25, 1980, and alleges that the District refused to negotiate in good faith concerning the effects of its decision to lay off certificated employees. Although evidence concerning unilateral changes that occurred in the fall of 1980 was introduced at the hearing, the Association neither amended its

> unfair practice charge nor filed a new charge independently alleging a violation of the District's duty to negotiate in good faith. As such, this later conduct can only be used as background evidence for adjudicating the earlier unfair practice charge and may not form the basis of a finding that the District independently violated the Act. Therefore, we conclude that the hearing officer's award of back pay based on that conduct exceeded his jurisdiction within the confines of this case. (Decision, p. 69-70.)

The Board further noted in a footnote that "[a]lthough the Board has, on several occasions, found Unalleged violations, it has never extended this principle to conduct occurring after the filing of the unfair practice charge." (Decision, p. 70, fn 31.)

The Association argues that the unfair practice charge in the case did properly allege that the District had unilaterally altered the workload of counselors, librarians, and nurses and changed certain coaching stipends. Thus, the charge alleged that the District had refused to bargain the impact and implementation of the layoffs and had taken unilateral action to implement the layoff which rendered negotiations futile. In addition, the Association requested that the District cease and desist from taking unilateral action and rescind all its past unilateral actions. Also, the Association notes that attached to the charge were the minutes of the Mt. Diablo school board meeting for February 5, 1980, in which the school board took formal action to increase counselor caseload. Thus, the

Association claims that "these allegations, taken together, put the District on notice that it was being charged for unilateral actions related to the impact and implementation of the layoff decision."

The Association further contends that, despite the fact that it presented evidence concerning these unilateral changes, at no stage in the proceedings did the District ever assert that such conduct had not been properly charged.

Finally, the Association contends that even if it did not formally allege these violations, the Board erred, as a matter of law, in limiting its review of Unalleged violations to conduct which occurred prior to the filing of the charge. In support of this contention, the Association argues that the federal courts and the National Labor Relations Board (NLRB) have held that Unalleged post-complaint conduct can be reviewed as long as the issues involved have been fully litigated. Curtiss-Wright Corp. v. NLRB (3d Cir., 1965) 347 F.2d 61 [59 LRRM 2433, 2440-2442]. Since, in this case, the Unalleged violations were intimately related to the subject matter of the complaint, were fully litigated, and the parties had the opportunity to cross-examine witnesses, the Board should have considered the issues. Santa Clara Unified School District (9/26/79) PERB Decision No. 104; Belridge School District (12/31/80) PERB Decision No. 157.

Essentially, the Association's argument is twofold. First, it is arguing that its unfair practice charge did, in fact,

properly allege that increases occurred in the workload of employees not subject to layoff and, second, that, even if that conduct was not specifically alleged, the Board should have considered the issue as an Unalleged violation.

As to the first of the Association's contentions, we find that it is a least partially correct. In Anaheim Union High School District (3/26/82) PERB Decision No. 201, at p. 10, the Board indicated that a unilateral action occurred at the time the governing board passed a formal resolution, even though the change was to have a delayed implementation date. See also Rio Hondo Community College District (3/8/83) PERB Decision No. 292. The record is clear that in its resolutions of February 5 and 6, 1980, the Mt. Diablo school board voted to increase the student/counselor ratio to 1 counselor for every 425 students, thus eliminating 13.7 counselor positions. (See Decision p. 8, fn 5.) These resolutions, though calling for a decrease in library and nursing staffs, do not specifically indicate that an increase in workload would occur for the remaining employees. Inasmuch as the minutes of the school board meetings were attached to the unfair practice charge, our finding with respect to the counselors, that an increase in caseload was never alleged, was an error. We shall consider the substantive issue raised by this allegation, infra.

The underlying Decision, however, correctly states that no independent violation of the Act was alleged concerning the

increase in caseload of librarians and nurses and the change in coaching stipends. Therefore, we must decide whether our determination in the underlying Decision, that we would not extend the "Unalleged violation" rule to conduct which occurred after the charge was filed, is correct as a matter of law.

In Santa Clara Unified School District, supra, the Board adopted the standard followed by the NLRB and the federal courts for reviewing Unalleged violations. Thus, the Board will consider Unalleged violations where: (1) the Unalleged violation is related to the subject matter of the complaint; (2) the allegedly unlawful conduct is part of the same course of action; and (3) the Unalleged violation is fully litigated (i.e. the parties have had an opportunity to examine and cross-examine witnesses and introduce evidence). This rule has been followed by the Board in numerous cases since Santa Clara[6] and continues to be the rule followed by the NLRB and the federal courts.[7]

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[6]See Belridge, supra; Sacramento City Unified School District (6/28/82) PERB Decision NO. 216; San Ramon Valley Unified "School District (8/9/82) PERB Decision No. 230; North Sacramento School District (12/20/82) PERB Decision No. 264; Modesto City Schools, supra; Rio Hondo Community College District PERB Decision No. 292, supra; The Regents of the University of California (UCLA) (12721/82) PERB Decision No. 267H.

[7]See, e.g. Southwestern Bell Telephone Co. (1978) 237 NLRB No. 19 [99 LRRM 1012J; Holly Manor Nursing Home (1978) 235 NLRB No. 56; NLRB v. Olympic Medical Corp. (9th Cir. 1979) ___ F.2d____[102 LRRM 2904]; Multi-Medical Convalescent Center (1976) 225 NLRB No. 56 [93 LRRM 1170J; Glasgow Industries (1974) 210 NLRB No. 22 [86 LRRM 1219].

Although the Board was correct in stating that we have never extended the Unalleged violation rule so as to base a violation on conduct which arose after the filing of a charge, the NLRB and the federal courts have entertained Unalleged violations in such circumstances. In Curtiss-Wright, supra, cited by the Association in support of its reconsideration request, the Third Circuit Court rejected an employer's argument that it was denied due process when an NLRB trial examiner based his finding of a violation on conduct which occurred after the complaint was filed. Noting that the issue was fully litigated during the course of the hearing so that the employer was on notice of the charges before it, the Court rejected as "mechanistic" the employer's contention that the complaint needed to have been formally amended to satisfy due process considerations. As the Court stated:

> Absent particularity of pleadings, the conduct of a party [at the hearing] may readily be tantamount to a submission to adjudication and, especially in an administrative proceeding, such adjudication may be based on facts arising subsequent to, as well as prior, to the filing of those pleadings. Although it may be desirable to formally conform the proof to the pleadings, in the light of the above considerations we do not feel it necessary to rule that such failure should here affect the administrative disposition of the substantive issues. We thus see no merit to the Employer position that facts arising subsequent to the filing of the amended complaint may not here serve as a basis for the determination of an unfair labor practice.
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> Curtiss-Wright, supra, 59 LRRM at 2441

A review of numerous NLRB and federal court cases dealing with Unalleged violations supports the Association's contention that the only significant questions in assessing whether to make legal findings based on Unalleged conduct is whether the conduct is related to the underlying charge and the issue was "fully and fairly litigated" at the hearing. See, e.g. NLRB v. Olympic Medical Corp., supra, citing Frito Co. v. NLRB (9th Cir. 1964) 330 F.2d 458 [59 LRRM 2933].

Thus, we find that the Board erred in stating that it will not extend its review of Unalleged violations to post-complaint conduct.

In this case, it is quite clear that the issue of librarian caseload relates to the underlying charge and was fully and fairly litigated in the course of the hearing.[8] The Association introduced several librarian witnesses to testify concerning the effect of the District's layoff decision on their workload. The District had the opportunity to cross-examine witnesses and, with respect to several witnesses, exercised that right. The District raised no due process objection to the introduction of this evidence at the hearing

[8]With respect to the issue of a change in nurse workload, the Association introduced only documentary evidence which, in the underlying Decision, we found to be insufficient to support a finding of a change in workload. We stand by that determination. Similarly, the Association introduced insufficient evidence to establish that any loss of coaching stipends was due to a unilateral change in coaching assignment policy.

nor did it raise such an objection in its exceptions brief before the Board.

Thus, we grant reconsideration to determine: (1) whether the workload of counselors and librarians is negotiable; and (2) if so, whether the District unilaterally altered the workload of these employees in violation of the Act.

5. Unilateral Change of Workload

In Davis Joint Unified School District (8/2/84) PERB Decision No. 393, the Board, applying the test set forth in Anaheim Union High School District (10/28/81) PERB Decision No. 177 for determining the negotiability of bargaining subjects not specifically enumerated in section 3543.2, determined that "workload," that is, the quantum of work to be completed during the workday, is negotiable. In that case, the Board found that the caseload of counselors expressed the amount of work that those employees were expected to perform during the workday, and as such, was negotiable. In this case, the Board must assess not only an alleged unilateral change in the workload of counselors, but of librarians as well.

The Davis case involved the broad question of whether workload as a subject of bargaining is negotiable during regular contract negotiations. In this case, we are faced with the question of whether the District made an unlawful unilateral change in the workload of counselors and librarians. In such a case, the charging party must present sufficient evidence to establish that: (1) by contract or past

practice, there existed a quantifiable measure of employee workload, whether expressed as a "caseload" or by some other means of determining the expected level of services to be delivered during the workday; and (2) that the District unilaterally increased the workload without affording the exclusive representative notice and an opportunity to negotiate.

Applying this test to the facts in this case, did the District unlawfully alter the workload of counselors and librarians in the fall of 1980?

Librarians;

In 1979-80, the District employed 19 librarians. After the layoff, only 15 librarians were left to service the District's elementary school libraries.

The only witness who testified concerning the workload, duties and impact of the layoff of the remaining librarians was Virginia Jouris. She testified that, prior to the layoff, two librarians were assigned to work at one elementary school each, and the remaining librarians were assigned to work at two schools each. In the fall of 1980, seven librarians who had formerly serviced two schools each were assigned to service three schools each. Jouris' testimony is corroborated by the District's assignment sheets for the 1978-79 and 1979-80 school years.

Jouris testified at length concerning the duties of librarians. She testified that librarians are responsible for

providing individual assistance to teachers in the development of class projects, developing library skills programs for students, and training volunteers. In the course of their duties, librarians regularly provide bibliographies for teachers, students, and parents. In addition to their resource function, librarians have overall responsibility for maintaining the libraries they are assigned to service.

Jouris testified that for the previous 10 years, she had serviced two elementary school libraries, each with approximately 8,000 books and other materials. As a result of the reduction in the number of librarians, she was assigned responsibility for an additional school. This increased the number of teachers to whom she was required to provide library services from 36 or 37 in 1979-80 to 58 in 1980-81.

Jouris testified that these added responsibilities significantly increased her overall hours of employment and that, as a result of the increase in her assigned duties, she could not complete her assigned work within the normal 7:15-2:45 workday.

The record reflects, and the District does not deny, that there has been a past practice of determining the workload of librarians based upon the number of schools which they are assigned to service. While the level and nature of the service to be provided at each school site was, to some extent, left to the individual judgment of the librarians concerned, there is

no question that at each school librarians were required to maintain the collection and provide resource services to students, teachers, and parents. Thus, as the number of libraries which librarians were required to service increased, the workload of librarians concomitantly increased: more libraries to service meant more books to order and more teachers, students, and parents to work with.

As a result of the District's actions, the librarians found themselves in the position of either working additional hours beyond their required workday or reducing the level of service which they had previously delivered to the public. The record reflects that the District made no effort to alter the nature of library services so as to prevent the workload of librarians from increasing as a result of their assignment to additional schools. Thus, the librarians were the victims of a classic "speedup" in their work assignment.

In sum, we conclude that the District's unilateral increase of the workload of librarians in the fall of 1980 breached its duty to negotiate in good faith, and thereby violated subsection 3543.5(c), and concurrently, subsections 3543.5(a) and (b). Accordingly, we shall order the District to restore the status quo and to negotiate with the Association concerning the change in librarian workload.

Counselors:

On February 5, 1980, the District's governing board formally resolved to reduce counseling services and to increase counselor caseload for the remaining counselors to 425 students.

Indeed, at the February 5, 1980 meeting the District further resolved that

> [a]ny action of this Board at its meeting of February 5, 1980, or any extension thereof, which impacts upon any existing Board policy shall be considered and recorded as a properly executed modification of that policy. (Emphasis added.)

As a result of this action, counselor caseload was, in fact, increased in the fall of 1980. For example, at the District's Clayton Valley School the authorized counselor caseload in 1979-80 was 355 students; in 1980-81 that caseload was increased to 444 students. At College Park School, the caseload was increased from 294 to 426 students. At Concord High School, the counselor caseload was increased from 263 to 430 students. At Mt. Diablo High School, the caseload was increased from 270 to 440 students.

Arlette Butler is a guidance counselor at Mt. Diablo High School, a position which she has occupied for approximately 10 years. Prior to the fall of 1980, Mt. Diablo High School utilized a system of counseling known as the "global counseling model." Under this model, counselors are responsible for

providing total counseling services to the students they are assigned to counsel. This would include individual counseling if such counseling were required. In addition, counselors were responsible for cases where "major" forms of discipline, such as suspension or expulsion, was required. They were also required to deal directly with parents and teachers.

On August 18, 1980, Clark Brown, the Director of Pupil Personnel Services and Ralph Belluomini, the Director of Secondary Curriculum, sent out a memorandum to District employees entitled "Counselor Duties for 1980-81." This document states, in pertinent part:

> The following items will provide the basis for determining how counseling services will be provided at the secondary schools during the coming school year:
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> . . . . . .
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> 2. The existing job description for counselors is satisfactory for defining the role of high school counselors. There is no need for revision.
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> 3. High school counseling services are to return to the pattern that was utilized prior to the time when vice principal allocations were exchanged for additional counselors and global counseling was initiated. In the future, "Global Counseling" will not be practiced by counselors. Major discipline problems, especially those that could lead to suspension, shall not be a counselor responsibility. This level of discipline shall be the responsibility of the administration.
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> . . . . . .

> 6. It is not expected that the return to established basic formula for assignment of high school counselors will require any increase in work-hours for counselors beyond current practice.

In addition, the Association introduced into evidence the Concord High School "Daily Bulletin" for September 30, 1980. This document is published by the District to inform students and faculty of important events at Concord High School. The document states:

> Any of Mrs. Butler's Seniors who are planning to attend a 4 year college should attend a meeting in B-l during 3rd period on Wed., Oct. 1. Individual counseling appointments for college planning will not be made this year due to the increased counseling load.

Butler testified that, in addition to this memorandum, there was a meeting at Mt. Diablo High School with Mr. Erwin, the Head Vice-Principal, who explained that counselors would no longer be able to do individual counseling but would have to shift to group counseling. She also testified that counselors were no longer required to perform campus supervision duties during the 15-minute "brunch" break each day.

Butler testified that she had spent most of the 1980-81 school year thus far making program changes for students, but this was fairly typical of the first few weeks of each school year. Nevertheless, in the past she had made approximately 100 program changes for the whole semester and thus far, during the 1980-81 school year, she had already made nearly 200 program changes.

Butler testified that her normal workday is from 7:30 a.m. until 2:35 p.m. She stated that in the past she had worked approximately 5 hours a week beyond the end of the work day and that, as a result of the increase in her caseload, she was working approximately 7.5 hours per week beyond the normal workday.

On cross-examination, Butler admitted that she had not complained to any supervisor about her increase in work hours. She also admitted that she had never been officially required to spend any hours beyond the official 7:30 to 2:35 workday. Nevertheless, she also testified that she could not complete her required work during the normal school day.

John Hartman, another counselor employed at Mt. Diablo and Concord High Schools, also testified concerning the impact of the increase in counselor caseload. He testified that, in the past, he had worked additional hours beyond the required 7:30 to 2:35 workday. He testified that he worked approximately five hours a week after school because he "found it easier to do some of my paperwork when students were not knocking on my door." Thus far, in the 1980-81 school year, he was working an average of 10 hours per week beyond the required workday. He testified that most of this extra work time is now spent "answering parents' phone calls and talking with them on the phone [and] working on program changes so I can get the kids in the classes before they've missed too much of the class to hurt

them." He also testified that this increase in workload was typical of the first few weeks of school and was generally temporary. Moreover, like Butler, Hartman testified that counselors were informed that they were no longer to handle major discipline problems.

There is no question, that, at its February 5, 1980 meeting, the governing board unilaterally increased the caseload of those counselors not subject to the layoff. As noted above, in Anaheim Union High School District, supra, PERB Decision No. 201, the Board found that a unilateral action is effective on the date the governing board issues its formal resolution, notwithstanding the fact the policy changes may have a later implementation date. Thus, the District's duty to negotiate, and its breach of that duty, arose at the date it took formal board action, on February 5, 1980, to increase counselor workload. It is also undisputed that there existed a long-standing past practice in the District of determining counselor workload based on a caseload system.

Therefore, since the Board has found counselor caseload negotiable and it is undisputed that the District unilaterally increased the caseload of counselors, we find its conduct to be a breach of its duty to negotiate in good faith in violation of subsections 3543.5(a), (b), and (c) of the Act.

However, we find that the District's later modification of the counseling system acted to eliminate the impact of the

unilateral change on the workload of counselors and, therefore, ameliorated the damage done by its earlier unlawful conduct. Accordingly, we shall order the District to cease and desist from making unilateral changes in workload and to post the customary notice to employees.

6. The Remedy

In fashioning a remedy for the District's violations, the Board found that, in order to assure meaningful negotiations, it was appropriate to order the District to pay lost wages to the laid-off employees for the period that negotiations occurred. This limited backpay remedy was patterned after that in use in the federal courts. See, e.g. NLRB v. Transmarine Navigation Corp. (9th Cir., 1967) 380 F.2d 933 [65 LRRM 2861]. The Board rejected the Association's claim that the laid-off employees should be reinstated and made whole for their losses, since the decision to lay off is nonnegotiable.

The Association requests reconsideration of the remedy, reasserting its contention that the laid-off employees should be reinstated with full back pay. In support of its request, it contends that the federal cases involving limited backpay awards concerned plant closures, which are distinguishable from layoffs. Unlike layoffs, after a plant is closed, there are "no jobs remain[ing] to which any employees could be reinstated."

This argument is a mere reassertion of the Association's claim that the laid-off employees are entitled to receive a full make-whole remedy. In the underlying Decision, the Board rejected this contention because the District was legally entitled to make the decision to lay off unilaterally, and was only required to negotiate the effects of that decision. As such, it was inappropriate to order the laid-off employees reinstated, since they would have been terminated even if the employer had acted lawfully. Thus, the Board's Order is fully consistent with the rationale underlying the limited backpay awards in the federal plant closure cases. Inasmuch as the Board has broad statutory authority to fashion remedies (see subsection 3541.5(c)), we find no basis to justify granting reconsideration of this portion of the remedy.

7. Request For Oral Argument

Pursuant to rule 32315,[9] the Association requests that oral argument be set to consider the issues raised in its request for reconsideration.

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[9]PERB rule 32315 provides:

> A party desiring to argue orally before the Board itself regarding the exceptions to the proposed decision shall file, with the statement of exceptions or the response to the statement of exceptions, a written request stating the reasons for the request. Upon such request or its own motion the Board itself may direct oral argument.

In the underlying Decision, the Board denied the Association's request for oral argument, finding the record was fully adequate to apprise the Board of the issues before it. We find no need to grant that request now.

ORDER

The Order in Mt. Diablo Unified School District (12/30/83) PERB Decision No. 373 is AMENDED to read as follows:

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Mt. Diablo Unified School District violated subsections 3543.5(a), (b), and (c) of the Educational Employment Relations Act. Pursuant to Government Code subsection 3541.5(c), it is hereby ORDERED that the District, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the Mt. Diablo Teachers Association, CTA/NEA, concerning the impact of the decision to lay off certificated employees and unilaterally changing the workload of counselors and librarians not subject to the layoff.

2. Denying the Mt. Diablo Teachers Association, CTA/NEA, the right to represent its members by failing and refusing to meet and negotiate in good faith over the effects of the decision to lay off certificated employees and by

unilaterally changing the workload of counselors and librarians not subject to the layoff.

3. Interfering with employees in the exercise of rights guaranteed to them by the Educational Employment Relations Act by failing and refusing to meet and negotiate in good faith over the effects of the decision to lay off certificated employees and by unilaterally changing the workload of counselors and librarians not subject to the layoff.

B. TAKE THE FOLLOWING ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Upon request, meet and negotiate with the Mt. Diablo Teachers Association, CTA/NEA, within thirty-five (35) days after this Decision is no longer subject to reconsideration, regarding the implementation of layoff and the following specific negotiating proposals related to the effects of layoffs which the Board has found to be within the scope of representation: paragraphs 1, 3, and 4 of the "Impact of Layoff" proposal; the "Counselor Workload" proposal in its entirety? paragraph 4 of the "Librarian Working Conditions" proposal.

2. Pay to the employees laid off a sum equal to their wages at the time they were laid off from the first day the Association requests to bargain concerning the subjects of bargaining enumerated in part B(l) of this Order until occurrence of the earliest of the following conditions: (1) the date the parties reach agreement; (2) the date the

statutory impasse procedure is exhausted; (3) the failure of the Association to request negotiations within thirty-five (35) days of service of this Decision; or (4) the subsequent failure of the Association to negotiate in good faith.

3. Restore the workload of librarians as it existed prior to the fall of 1980 and meet and negotiate with the Mt. Diablo Teachers Association, CTA/NEA, concerning the workload of those librarians. However, the status quo ante with regard to librarian workload need not be restored if the parties, on their own initiative, have subsequently reached agreement or negotiated in good faith through completion of the statutory impasse procedure in negotiations concerning the workload of librarians.

4. Within 35 days after this Decision is no longer subject to reconsideration, post at all school sites and all other work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that said Notices are not reduced in size, altered, defaced or covered by any other material.

5. Notify the San Francisco Regional Director of the Public Employment Relations Board, in writing, of the steps the District has taken to comply herewith in accordance with her instructions.

6. The unfair practice charge filed by the Mt. Diablo Federation of Teachers, Local 1902, CFT/AFT, AFL-CIO, in Case No. SF-CE-455 is DISMISSED.

7. The parties' request for oral argument pursuant to PERB rule 32315 is DENIED.

This Order shall become effective immediately upon service of a true copy thereof on the Mt. Diablo Unified School District.

Member Burt joined in this Decision.

Chairperson Hesse's concurrence begins on page 31.

Member Morgenstern's concurrence and dissent begins on page 32.

Hesse, Chairperson, concurring: Although I concur with the results in this case, I must disassociate myself from the discussion concerning the caseload of non-teaching personnel. As I noted in the dissent in Davis Joint Unified School District (8/2/84) PERB Decision No. 393, I do not find caseload per se to be a subject within scope of bargaining. Only when and if caseload impacts on an enumerated subject such as hours does it become negotiable.

Notwithstanding my dissent in Davis, here I can concur with the majority because the record reflects that the change in librarian caseload resulted in an increase in hours. Thus, the District was under a duty to negotiate the impact of changing the number of schools serviced by the individual librarians. Conversely, the counselor caseload here is not negotiable because the record shows that the District made changes in the type of service offered so that the increase in the number of students per counselor did not affect the total number of hours worked by the counselors.

Therefore, although I concur with the result reached by the majority, I do so only because the record here supports a finding of an impact on an enumerated subject, and not because I believe caseload, in and of itself, is within the scope of bargaining.

Morgenstern, Member, concurring and dissenting: The disputes I had with the majority in the underlying decision persist and, thus, I am prompted to submit this separate response to CTA's reconsideration request.

I of course find merit in CTA's assertion that the statutory language of Education Code section 44955 directing that the governing board determine the same-date-of-hire criteria based "solely on the needs of the district and the students" need not be read to remove this critical topic from the collective bargaining process. By interpreting the Code provision as a basis for denying EERA's guarantees, the majority eschews the Board's standard, fully credited by the California Supreme Court, that mandates supersession only where the statutory language of the Education Code is cast as an inflexible standard or an immutable provision.[1] In order to reach its decision, the majority must read into the Education Code provision a conclusion that, as a matter of law, bilateral decision-making cannot accommodate the needs of the District and the students. I find no basis in the words of section 44955 for that conclusion.

I am also at odds with the manner in which the majority further obfuscates the central caseload issue by persisting in its view that the unilateral change said to be the result of

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[1]San Mateo City School District v. Public Employment Relations Board (1983) 33 Cal.3d 850 [___Cal.Rptr.___].

the layoff is something separate from the negotiable layoff effect. As I plainly articulated in my dissent in the underlying decision:

> . . . the negotiable component of the layoff decision is, by definition, that which affects the wages, hours, and enumerated terms and conditions of employment. What the majority might envision as a separate unilateral change is none other than the demonstrable effect of management's decision to lay off some of its workers. (P. 78.)

The majority's lengthy discussion of Unalleged violations in this reconsideration decision is an ill-concealed effort to somehow reconcile this case with the conclusions enunciated in the recent decision in Davis, supra. Unfortunately, however, it fails to do so. Indeed, its detailed recitation of the librarians' and counselors' hours would seem to be irrelevant since, in Davis, the majority finds the subject of caseload to be negotiable per se without any requirement that a relationship to hours need be demonstrated. The lengthy discussion here appears to be included for the purpose of proving the very adverse impact which the majority finds unnecessary in Davis.

Thus, in the instant case, I continue to maintain that the negotiability of workload or caseload, whether the issue takes the form of an initial bargaining proposal or a unilateral change instituted by the employer, depends on a relationship between caseload and wages, hours or other enumerated terms and conditions of employment.

APPENDIX

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-452, in which all parties had the right to participate, it has been found that the Mt. Diablo Unified School District has violated subsections 3543.5(a), (b), and (c) of the Educational Employment Relations Act. As a result of this conduct, we have been ordered to post this notice and we will:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the Mt. Diablo Teachers Association, CTA/NEA, concerning the impact of the decision to lay off certificated employees and by unilaterally changing the workload of counselors and librarians not subject to the layoff.

2. Denying the Mt. Diablo Teachers Association, CTA/NEA, the right to represent its members by failing and refusing to meet and negotiate in good faith over the effects of the decision to lay off certificated employees and by unilaterally changing the workload of counselors and librarians not subject to the layoff.

3. Interfering with employees in the exercise of rights guaranteed to them by the Educational Employment Relations Act by failing and refusing to meet and negotiate in good faith over the effects of the decision to lay off certificated employees and by unilaterally changing the workload of counselors and librarians not subject to the layoff.

B. TAKE THE FOLLOWING ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Upon request, meet and negotiate with the Mt. Diablo Teachers Association, CTA/NEA regarding the implementation of layoff and the following specific negotiating proposals related to the effects of layoffs which the Board has found to be within the scope of representation: paragraphs 1, 3, and 4 of the "Impact of Layoff" proposal; the "Counselor Workload" proposal in its entirety; paragraph 4 of the "Librarian Working Conditions" proposal.

2. Pay to the employees laid off a sum equal to their wages at the time they were laid off from the first day

the Association requests to bargain concerning the subjects of bargaining enumerated in part B(l) of PERB's Order until occurrence of the earliest of the following conditions: (1) the date the parties reach agreement; (2) the date the statutory impasse procedure is exhausted; (3) the failure of the Association to request negotiations within thirty-five (35) days of service of PERB's Decision; or (4) the subsequent failure of the Association to negotiate in good faith.

3. Restore the workload of librarians as it existed prior to the fall of 1980 and meet and negotiate with the Mt. Diablo Teachers Association, CTA/NEA, concerning the workload of those librarians. However, the status quo ante with regard to librarian workload need not be restored if the parties, on their own initiative, have subsequently reached agreement or negotiated in good faith through completion of the statutory impasse procedure in negotiations concerning the workload of librarians.

Dated: MT. DIABLO UNIFIED SCHOOL DISTRICT

By _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE DEFACED, ALTERED, REDUCED IN SIZE OR COVERED BY ANY OTHER MATERIAL.